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No. 93-350

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ALLSTATE LIFE INSURANCE CO.,
An Illinois Corporation, *et al.*,

Petitioners,

vs.

LINTER GROUP LIMITED, A Limited Company
Incorporated Under the Laws of the State of New South Wales
in the Commonwealth of Australia, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LINTER RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-QUESTION PRESENTED

Did the Second Circuit, faithfully applying well-settled international comity principles, properly conclude that the district court did not abuse its discretion when it deferred to foreign insolvency proceedings and dismissed petitioners' claims against foreign corporations, with no United States assets, presently involved in Australian liquidation proceedings?

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STATEMENT OF THE CASE

This opposition brief is submitted by respondents Lindsay Philip Maxsted and John Beresford Harkness, in their capacity as liquidators of the respondent Linter companies, and by respondents John Wilson Blood and David Gale, two former directors of certain Linter companies.[1] The brief sets forth the

[1] The respondent Linter companies are: Linter Group Ltd., Linter Textiles Corporation Ltd., Appunga Pty. Ltd., Bradmill Textiles Ltd., Bradmill

(Footnote continued)

reasons the petition should be denied with respect to the issues of comity, petitioners' second question presented. A separate brief in opposition filed by the respondent banks[2] addresses petitioners' first question presented, involving issues of *forum non conveniens*.[3]

A unanimous panel of the Second Circuit (Judges Timbers, Kearse and Altimari) properly found that the district court did not abuse its discretion in dismissing, on the grounds of international comity, the petitioners' district court claims against the Australian Linter respondents, none of whom had any assets in the United States, in deference to ongoing liquidation proceedings in Australia. The Second Circuit applied well-settled principles of international comity, neither making new law nor reaching a holding inconsistent with the holdings of this Court or any court of appeals.

Workwear Pty. Ltd., Formfit Holdings Ltd., Hilton Hosiery Company Ltd., Jacquard Fabrics Australia Ltd., King Gee Clothing Company Ltd., Kortex Australia (Holdings) Ltd., Kotara Ltd., National Textiles Ltd., Pelaco Australia (Holdings) Ltd., Speedo Group Ltd., Speedo Knitting Mills Pty. Ltd., Speedo International B.V., The Stubbies Clothing Company Ltd. and Toronto Fashions (Holdings) Ltd. The Linter companies have no publicly traded parents or subsidiaries other than companies included in the foregoing list of respondent companies.

The Linter companies, the liquidators, and Messrs. Blood and Gale hereinafter are referred to collectively as the "Linter respondents."

[2] The respondent banks are: Australia and New Zealand Banking Group Ltd., Bank of New Zealand, Barclays Bank Australia Ltd., Chase AMP Bank Ltd., Commonwealth Bank of Australia, Security Pacific Australia Ltd., State Bank of South Australia, Sumitomo International Finance Australia Ltd. and Westpac Banking Corporation.

[3] In addition to its ruling on comity, the Second Circuit also properly found no abuse of discretion by the district court when that court dismissed petitioners' claims against the respondent banks on *forum non conveniens* grounds. The district court did not rely on *forum non conveniens* in its decision to dismiss petitioners' claims against the Linter respondents, and the Second Circuit did not address the issue in upholding the dismissal of the Linter respondents. Accordingly, the dismissal of the Linter respondents on comity grounds should be upheld even if this Court were to grant a writ of certiorari on the *forum non conveniens* question.

Petitioners are institutional investors that hold debentures issued by Linter Textiles Corporation Ltd. At the time of the debenture offering, petitioners were informed that the Linter companies were foreign companies with no United States presence. The Linter companies subsequently entered receivership and defaulted on the notes.

The respondent Linter companies are all involved in liquidation proceedings in Australia. (A3-4)[*] Petitioners concede that these liquidation proceedings are fundamentally fair. (Petition at 62 n.7) Indeed, they have participated in these proceedings virtually from their inception. Presently, the assets of the Linter companies have been liquidated into cash and receivables. The liquidators must determine the rights of the various creditors, under the Australian court's ultimate supervision, and distribute the funds of the liquidating companies to those creditors.

Petitioners filed two lawsuits against the Linter companies in the United States in order to obtain a preference in the distribution of proceeds in the Australian liquidation proceedings involving those companies. In one lawsuit ("Linter I"), petitioners claimed that the Linter companies made material omissions and misrepresentations at the time of the debenture offering. In a related lawsuit ("Linter II"), petitioners also claimed that certain secured creditors of the Linter companies, the respondent banks, aided and abetted in the alleged securities violations of the Linter companies.

None of the Linter respondents has any assets in the United States. Accordingly, any judgment against the Linter companies that petitioners might have obtained in the United States could have been enforced only in Australia in the context of the Australian liquidation proceedings, and petitioners acknowledged their intention to use any such judgment as the basis for a claim in the Australian proceedings.

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[*] Citations to the Appendix to the Petition for a Writ of Certiorari are designated as "A __."

Under Australian insolvency law, the Linter companies' assets are protected by the automatic stay provisions of Australian law which, in parallel with automatic stay provisions in this and other countries, prohibit actions in Australia from being commenced or going forward against the Linter companies without leave of the Australian court.[5] In accordance with those procedures, petitioners sought leave to file, and subsequently filed, actions in the Federal Court of Australia asserting comparable claims to those asserted in the United States actions. Petitioners have filed another action in the Equity Division of the New South Wales Supreme Court seeking a declaration that, under Australian law, their claims are not subordinated to the claims of other creditors.

The district court, in deciding to dismiss the claims against the Linter respondents, relied on well-established principles of comity that support deference to foreign insolvency proceedings in order to allow the assets of a foreign debtor to be dispersed in an equitable, orderly, and systematic manner. Before determining to defer to the Australian liquidation proceedings, the court satisfied itself that the Australian proceedings

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[5] Section 471(2) of the Australian Corporations Law, and its identical predecessor statute, Section 371(2) of the Companies (New South Wales) Code, state:

> Where an order has been made for the winding up of a company, or a provisional liquidator has been appointed in respect of a company, no action or other civil proceeding may be commenced or proceeded with against the company unless:
>
> (a) by leave of Court; and
>
> (b) in accordance with such terms as the Court imposes.

During the liquidation of the Linter companies, Section 471(2) of the Australian Corporations Law superseded Section 371(2) of the Companies Code.

comported with fundamental standards of procedural fairness.[6] (A95-98)

The Second Circuit reviewed the district court's decision to dismiss the Linter respondents for abuse of discretion. (A6) Applying the well-established principles of comity that advocate deference to foreign insolvency proceedings, the appellate court concluded that the district court did not abuse its discretion. (A7)

REASONS FOR DENYING THE REQUESTED WRIT

The decisions of the Second Circuit and the district court are entirely consistent with decisions of other United States courts, which uniformly extend comity to foreign insolvency proceedings to further the equitable and systematic distribution of foreign debtors' assets. Comity is routinely extended by United States courts out of recognition and deference to the interests of foreign courts in winding up the affairs of their own domestic business entities.

Petitioners do not claim that the Second Circuit announced a new legal precept concerning international comity. Nor do

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[6] After the district court dismissed the claims against the Linter respondents, petitioners made several unsuccessful attempts to convince the Australian court supervising the Linter liquidation to intervene in the United States proceedings. The Australian court properly rejected these attempts to circumvent the effects of the district court's comity ruling.

On July 13, 1992, petitioners sought a declaration from the Australian court that allowing the United States actions to go forward in the United States would not violate New South Wales policy and that the Australian court did not regard Australian courts as more suited than United States courts to adjudicate the claims asserted in the United States actions. On October 9, 1992, the Australian court denied this request, properly viewing it as petitioners' attempt to obtain an unwarranted advisory opinion to take to the United States court.

On October 22, 1992, petitioners sought another order from the Australian court that would direct the liquidators to consent to the reinstatement of the district court actions and to allow them to proceed in the United States. The Australian court refused to issue such an order and concluded that "it does not appear to me that issues of law are likely to arise [with respect to the petitioners' claims] which could not be adequately dealt with in this Court."

they assert that the Second Circuit's holding with respect to comity conflicts with decisions of this Court or any lower court. Rather, they argue that the Second Circuit erred in failing to find an abuse of discretion in the district court's application of unchallenged principles of comity to the particular circumstances of the cases before it. That argument provides no sufficient reason to grant the requested writ.

Moreover, the argument that the courts below erred and abused their discretion is based on petitioners' misapprehension of comity and distortions of Australian insolvency law. First, petitioners refuse to acknowledge that the doctrine of comity represents a principle of United States law to be applied by a United States court in determining whether, as a matter of United States policy, it is appropriate to defer to a foreign proceeding. Second, petitioners incorrectly assert that the Australian court supervising the Linter liquidation has mandated that petitioners should be allowed to prosecute their claims in the United States, when in fact the Australian court merely declined to proffer what it deemed "gratuitous advice" to the district court regarding the choice of forum. Finally, petitioners posit without support that Australian law does not favor the centralized distribution of an insolvent's assets, an argument baselessly extracted from statements by Australian courts that Australia's laws — like the laws of any country — do not have extraterritorial effect. These arguments do not indicate that the Second Circuit erred in affirming the district court's exercise of discretion and certainly fail to provide the necessary special and important reasons for granting the requested writ.[7]

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[7] Petitioners also devote a large portion of their petition to setting forth uncontroverted "facts" allegedly demonstrating that their case has merit. Apart from being irrelevant both to the determinations below and to this Court's decision whether to grant the requested writ, these "facts" are uncontroverted only because the district court dismissed both Linter actions before any deposition discovery took place and before the Linter respondents were required to produce any documents or engage in any discovery whatsoever. Petitioners' "corroborated" and "undisputed" "facts" thus are derived solely from documents produced by third parties and the bank respondents, about which there has been no testimony whatsoever.

I. THE SECOND CIRCUIT'S DECISION MADE NO NEW LAW AND DOES NOT CONFLICT WITH ANY DECISION BY THIS COURT OR ANY COURT OF APPEALS.

Petitioners make no claim that the Second Circuit's decision, or the underlying decisions of the district court, established a new rule of law or created any conflict with the decisions of other courts. They do not claim that the Second Circuit applied the wrong standard of review to the district court's comity rulings.

No such arguments properly could be made. The Second Circuit utilized the correct standard of review and followed well-established legal principles regarding comity to determine that the district court did not abuse its discretion when it dismissed petitioners' claims against the Linter respondents in deference to the Australian liquidation proceedings.[8]

The Second Circuit and the district court grounded their decisions in the basic definition of comity set out long ago by this Court in *Hilton v. Guyot*, 159 U.S. 113, 164 (1895):

> the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Comity is to be accorded so long as the foreign proceedings are before a court of competent jurisdiction, the proceedings are procedurally fair, and no violation of the laws and policy of the United States results from the recognition of the proceedings. *See, e.g., Hilton*, 159 U.S. at 202-03; *Cunard Steamship Co. v. Salen Reefer Services, A.B.*, 773 F.2d 452, 457 (2d Cir. 1985).

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[8] The Second Circuit properly viewed the extension of comity as a matter within the district court's discretion and correctly reviewed that court's decision for abuse of discretion. (A6) *See Remington Rand Corporation-Delaware v. Business Systems, Inc.*, 830 F.2d 1260, 1266 (3d Cir. 1987); *Cunard Steamship Co. v. Salen Reefer Services, A.B.*, 773 F.2d 452, 460 (2d Cir. 1985).

As the Second Circuit noted (A6), the extension of comity is particularly appropriate where foreign insolvency proceedings are involved — a point uniformly recognized by the courts of appeals that have addressed the issue. *See Victrix Steamship Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713 (2d Cir. 1987) ("American courts have long recognized the particular need to extend comity to foreign bankruptcy proceedings."); *Cunard Steamship Co. v. Salen Reefer Services, A.B.*, 773 F.2d 452, 458 (2d Cir. 1985) ("American courts have consistently recognized the interest of foreign courts in liquidating or winding up the affairs of their own domestic business entities."); *In re Enercons Virginia, Inc.*, 812 F.2d 1469, 1473 (4th Cir 1987); *In re Colorado Corp.*, 531 F.2d 463, 469 (10th Cir. 1976). *See also Lindner Fund, Inc. v. Polly Peck Int'l PLC*, 143 B.R. 807, 810 (S.D.N.Y. 1992); *Kenner Products Co. v. Societe Fonciere et Financiere Agache-Willot*, 532 F. Supp. 478, 479 (S.D.N.Y. 1982); *Cornfeld v. Investors Overseas Services, Ltd.*, 471 F. Supp. 1255, 1259 (S.D.N.Y.)("[T]he firm policy of American courts is the staying of actions against a corporation which is the subject of a bankruptcy proceeding in another jurisdiction."), *aff'd*, 614 F.2d 1286 (2d Cir. 1979).[9] The policy underlying this consistent deference to foreign insolvency proceedings is straightforward: It "enables the assets of a debtor to be dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion." *Cunard*, 773 F.2d at 458.

Adhering to these well-established principles regarding comity in the foreign insolvency context, the Second Circuit and the district court carefully and correctly ensured that the Australian proceedings were procedurally fair and violated no United States

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[9] In addition, the United States Bankruptcy Code expressly recognizes principles of international comity and respect for foreign bankruptcy proceedings. Section 304 provides that a court may enjoin the commencement or continuation of any action against a debtor with respect to property involved in a foreign bankruptcy. 11 U.S.C. § 304. Section 305(a) enables a court to dismiss a United States bankruptcy action against a debtor if there is a pending foreign bankruptcy. 11 U.S.C. § 305(a). These provisions, however, do not provide the exclusive remedy for a foreign insolvent entity seeking to stay or enjoin United States proceedings. *See, e.g., Cunard*, 773 F.2d at 454-56.

policy. (A7; A95-98) Satisfied that those criteria were met, the Second Circuit affirmed the district court's exercise of its discretion in choosing to extend comity to the Australian proceedings.

Petitioners advance no basis for this Court to review the unexceptional, straightforward application of uncontroversial comity principles by the courts below. Petitioners have identified no respect in which the law applied by the Second Circuit departs from the well-settled principles previously applied by this Court, the Second Circuit, or the other courts of appeals.

II. THE SECOND CIRCUIT AND THE DISTRICT COURT CORRECTLY APPLIED WELL-SETTLED COMITY PRINCIPLES.

Petitioners' reasons for granting a writ of certiorari reduce to their dissatisfaction with the discretionary application of well-settled comity principles by the courts below. Such attacks on the application of unchallenged legal principles to the specific circumstances of a particular case fail to provide any sufficient basis for granting the requested writ.

In any event, petitioners' arguments lack merit and fail to establish any error by the Second Circuit or any abuse of discretion by the district court. Their arguments are based on a misunderstanding of comity and distortions of Australian insolvency law.

Petitioners make no claim that the Second Circuit or the district court erred in finding that the Australian proceedings were fair or in concluding that the United States policy of centralization of a bankrupt's assets would be furthered by granting comity. Indeed, petitioners expressly admit that the Australian proceedings are procedurally fair. (Petition at 62 n.7) Rather, petitioners argue that comity was inappropriate because the Australian court supervising the Linter liquidation proceedings expressly held that petitioners should be allowed to prosecute the United States actions and because Australian insolvency law purportedly does not favor the centralization of an Australian insolvent company's assets. Neither of these arguments is supported by the record.

First, the Australian court supervising the liquidation has never "expressly held that petitioners are entitled to prosecute their actions in the United States." (Petition at ii) Rather, despite petitioners' entreaties, the Australian court expressly refused to address the appropriateness of a United States forum. Upon the dismissal of their United States claims by the district court, petitioners sought the assistance of the Australian court to circumvent the district court's comity rulings and requested declarations as to Australian public policy and the relative suitability of the Australian and United States forums. The Australian court correctly and unambiguously refused to issue any such declaration, stating in its October 9, 1992 judgment: "It is no part of the function of this Court to proffer gratuitous advice to foreign Courts as to matters of New South Wales public policy or as to the relative suitability of Australian or foreign Courts to adjudicate upon particular claims . . . ." Thus, contrary to petitioners' argument, the Australian court expressly declined to "proffer gratuitous advice" as to the proper forum.[10]

Second, petitioners argue that comity is inappropriate because Australian insolvency law does not favor the centralization of

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[10] Petitioners also stress that the Australian court supervising the Linter liquidation proceedings may choose not to hear their claims directly but rather might refer them to a separate trial court. (Petition at ii, 26-28) The district court considered and properly rejected this argument as a reason to withhold comity:

> Plaintiffs believe that due to the complexity of their claims, the Australian bankruptcy court most likely will permit the separate prosecution of their claims in the Australian Federal Court Action. . . . Thus, Plaintiffs argue that Defendants' comity motion is really a *forum non conveniens* motion in disguise and should be treated as such. . . . The Court disagrees. That the Australian bankruptcy court may, as a matter of procedural efficiency, defer to another tribunal more suited to adjudicate Plaintiffs' complex claims does not mean that this is a *forum non conveniens* motion. The Court grants comity to the Australian Bankruptcy proceedings not because it believes that the Australian Federal Court is a more convenient forum, but because it recognizes and respects the policy rationale in deferring to foreign insolvency proceedings. (A106-07 (footnote and citations omitted))

an insolvent Australian company's assets. As a threshold matter, petitioners' focus on a foreign country's policy is misplaced as such policy is not determinative of a United States court's decision to extend comity. Comity involves the determination by a United States court, based on considerations of United States policy and international duty, whether an action should go forward or be dismissed in deference to foreign proceedings. *See, e.g., Hilton v. Guyot*, 159 U.S. 113, 164 (1895); *Cunard Steamship Co. v. Salen Reefer Services, A.B.*, 773 F.2d 452, 459 (2d Cir. 1985) ("*public policy of the United States* would be best served by recognizing the Swedish proceedings" thereby facilitating the orderly and systematic distribution of the debtors' assets) (emphasis added); *Kenner Products Co. v. Societe Fonciere et Financiere Agache-Willot*, 532 F. Supp. 478, 479 (S.D.N.Y. 1982) ("[I]nternational comity, as well as *United States public policy*, requires that we defer to the French bankruptcy court . . . .") (emphasis added).

Moreover, petitioners' view of Australian insolvency policy is unsupported and incorrect. As noted above, *see supra* n.5, Australian law contains an automatic stay provision that stays all domestic Australian actions against companies in liquidation. Petitioners cite several Australian and English cases (Petition at 54-58) that petitioners assert undercut this statute's clear purpose of centralizing a liquidating company's assets. These cases, however, provide no such anti-centralization policy statement. Rather, these cases merely state a legal truism that Australia's laws, including the stay provision, do not have extraterritorial effect — a truism also noted long ago in *Hilton v. Guyot*, 159 U.S. 113, 163 (1895): "No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived."

Neither court below concluded that the Australian stay statute applied here, automatically staying petitioners' claims in the United States. (*See* A7-8; A101-02) If that were the case, the extension of comity would have been superfluous. Rather, the Australian stay provision — like analogous provisions in other sister common law jurisdictions — was relevant simply as a

reflection of the Australian policy, shared with the United States, of facilitating the equitable, orderly, and systematic distribution of an insolvent company's assets. Nothing in the foreign cases cited by petitioners controverts the plain reading of the Australian stay statute as evidencing a clear policy of centralizing assets.[11]

In sum, petitioners have failed both to articulate any sufficient reason warranting the grant of the requested writ and to point to any error whatsoever in the rulings by the courts below on the issues of comity.

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[11] In fact, at least one Australian case cited by petitioners (Petition at 54), *Capita Financial Group Ltd. v. Rothwells Ltd.*, (1989) 7 A.C.L.C. 371, 376 (SC (N.S.W.)), expressly states a policy of centralization:

> It must be kept in view that the intention of the Winding Up Act and of all legislation respecting insolvency is to get within the control of the court all the estate of the insolvent company, to settle there all claims of debt . . . in the simplest and least expensive way, and to distribute its assets among its creditors in the most expeditious manner possible and not to have the proceedings of the winding up court or the distribution of the assets delayed or impeded by or dependent upon outside or expensive litigation in other courts. (Citations omitted)

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

September 30, 1993

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